No. 80-5887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD H. WHITE, *Petitioner,*

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF THE COUNTY OF ROCKLAND, NEW YORK as *AMICUS CURIAE*

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CONSENT OF PARTIES

This brief is submitted in accordance with Rule 36.4 of the United States Supreme Court Rules by the County of Rockland, a political subdivision of New York State, by its authorized law officer, the County Attorney of Rockland County. In addition, the County Attorney has received consent from both Petitioner and Respondent to file this Brief. The County of Rockland supports the position of the Respondent and the opinion of the First Circuit Court of Appeals.

INTEREST OF AMICUS CURIAE

The interest of the County of Rockland in filing a brief amicus curiae is twofold.

First, as a municipal subdivision expending public funds, the County of Rockland contends that a final judgment ends litigation and the prevailing party must be

held strictly to the time limitations controlling discretionary awards of attorneys' fees. A party is entitled to recover attorneys' fees only when application is made in full compliance with the Rules of Federal Procedure.

A second and more specific reason for the filing of this brief is a pending motion for attorneys' fees in the case of *Finkel* v. *Branti* which was submitted to and is awaiting trial before Justice Vincent Broderick of the Southern District of New York. *Branti* v. *Finkel,* 445 U.S. 507, 631 L.Ed.2d 574, 100 S.Ct., 1287, was decided by this Court on March 31, 1980, in a six-to-three decision affirming the order of the Second Circuit Court of Appeals which affirmed the final judgment of the Southern District of New York. Four-and-a-half months after the affirming decision of this Court, the prevailing party, *for the first time,* applied for an award of attorney's fees. The County argues that, in the absence of any application whatever for attorney's fees during the pendency of the action, a judgment after trial, which is affirmed by the United States Supreme Court without remand, is an absolutely final judgment, and that a motion for counsel fees, made for the first time two-and-a-half years after the District Court judgment (which disposed of all the issues in the case) is barred by Rule 59(e) of the Federal Rules of Civil Procedure.

The issues before this Court on this appeal from the First Circuit decision in *White* v. *New Hampshire Dept. of Employment Security* presents an opportunity to reinforce the principle that a final judgment can only be amended or modified in strict conformance with the Rules of Federal Procedure, thus establishing a finite end to litigation and avoiding multiplicity of actions. Obviously, the decision of this Court in *White* could be entirely dispositive of the same issues in *Branti* and a multitude of other pending cases.

ARGUMENT

POINT I

The Judgment Entered By The District Court Was A Final Judgment Which Terminated The Action And Terminated Any Further Right To Seek Attorneys' Fees.

A final judgment is a judgment which decides all of the issues then before the Court in a pending case (see Rule 54(b), Federal Rules of Civil Procedure). After final judgment, counsel fees can only be added by a timely motion to amend the judgment. Rule 59(e) of the Federal Rules of Civil Procedure provides that a motion to alter or amend a judgment shall be served not later than ten days after entry of the judgment. Rule 6(b) provides that a court may not extend the time limitation established by Rule 59(e); *Moody* v. *U.S. Board of Parole,* 390 F. Supp. 1403 aff'd. 502 F. 2d 1165. Since the judgment on the consent decree in *White* was entered on January 26, 1979, the period within which a motion under Rule 59(e) could have been made, expired on February 5, 1979, and the motion, when made, was barred.

Fase v. *Seafarers' Welfare & Pension Plan,* 79 FRD 363 (Eastern District New York 1978) aff'd 589 F. 2d 112(1978) is the Second Circuit authority on this issue. It is also cited in the case of *Hirschkop* v. *Snead,* 475 F. Supp. 59 (Eastern District, Virginia 1979) aff'd. 646 F. 2d 149 (Fourth Circuit 1981) which is the Fourth Circuit authority. In *Fase,* plaintiff's motion for attorney's fees was not served until more than thirty days after the entry of judgment in his favor. The District Court stated "Plaintiff's motion for attorney's fees was not timely filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (F.R.C.P.) which requires that a motion to alter or amend a judgment be served within ten days after

entry of the final judgment." In the *Hirschkop* case, the Eastern District Court of Virginia entered judgment on April 2, 1979. On May 3, 1979, plaintiffs moved for an award of attorneys' fees under the Civil Rights Act. The Court stated: "The first question for the Court to consider is whether the judgment of April 2, 1979 is a final order or whether the failure of the Court to resolve the question of attorneys' fees in that order deprived that order of finality under Rule 59(e)," *Hirschkop* v. *Snead,* supra, at pg. 61. The plaintiff in that case argued that, because the Court had not determined the matter of attorneys' fees in its order of April 2nd, that order was not final for the purposes of 59(e). The Virginia Eastern District Court disagreed and, holding that there was a final order terminating the litigation, said: "The order of 2 April resolved all issues then before the Court and left nothing for the Court to do but execute the judgment. *Catlin* v. *U.S.,* 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L.Ed. 911 (1945)."

The judgment in *White* v. *New Hampshire* entered January 26, 1979 fully resolved all issues then before the Court notwithstanding that it did not award attorneys' fees. Since petitioners failed to preserve their rights by moving timely to alter or amend the judgment, "The defendant is entitled to the certainty and protection afforded by the Federal Rules on the scope and finality of judgments." *Fase* v. *Seafarers,* supra, at 367.

In a recent case, *Johnson* v. *University of Bridgeport,* 629 F. 2d 828 (Second Circuit 1980) the question was whether the judgment was final, thereby barring an application for attorney's fees. In *Johnson,* unlike this case, there had been a timely application for an award of attorney's fees which the Court failed to rule on. Therefore, the Circuit Court held that whether or not a

judgment is final depends upon the intent of the Court. In *Johnson,* the Court's failure to act on the motion for attorney's fees was construed as being indicative of the Court's intent that the judgment not be final. It would appear that the case also stands for the corollary that, absent a timely motion which is undecided or some other specific indication of the Court's intent to keep the matter open, the judgment is final and a subsequent application for attorney's fees is barred.

The case of *Branti* v. *Finkel,* supra, demonstrates the ultimate mischief that occurs when parties fail to adhere strictly to the Federal Rules of Civil Procedure. *Branti* was a case brought under 42 USC 1983 wherein there was no application made for attorney's fees in the complaint, or at any time prior to, or within ten days after, the Southern District judgment. Said judgment was affirmed by the Circuit Court of Appeals and this Court without remand. Two-and-a-half years after the District Court's final judgment, and nearly five months after the Supreme Court's affirmance, without remand, a motion for attorney's fees was made for the first time.

In the case at bar, this Court is being asked to approve similar belated procedures to reopen a final judgment. This case affords an opportunity for this Court to clarify when and in what manner a judgment becomes final. Rockland County contends that Rule 59(e) should be strictly construed and adhered to, as are other statutes which proscribe limitations of time for initiating actions. If this Court were to permit extension of the Rule 59(e) ten day limitation to 135 days in the case at bar, what would prevent the Courts from extending said time to two-and-a-half years in *Branti* or 10 years in another case?

POINT II

Petitioner's Claim For Attorneys' Fees Cannot Be Categorized As Independent Or Collateral And May Not Be Considered In A Separate Action.

In *Hirschkop* v. *Snead,* supra, plaintiff argued that his claim for attorney's fees was a collateral or independent claim which did not affect the finality of the order and thus, could be considered after the entry of judgment. The Court responded to that argument thusly: "One of the necessary attributes of a collateral claim is that it must be separable from the rights asserted in the main claim and neither affect nor be affected by the decision on the merits. *Wright, Miller & Cooper, Federal Practice & Procedures,* Section 3911, p. 470." Under that standard, it is clear that a discretionary award of attorney's fees under Section 1988 is not a collateral matter. An award of attorney's fees under 1988 is an award to the prevailing party (not the attorney) and is necessarily and exclusively made dependent upon the merits of the case. Such award is differentiated in *Hirschkop* from a fee award to the attorney directly in a "fund" case or an independent application (such as a Social Security matter); see *Johnson* v. *University of Bridgeport,* supra.

The same principles should be applied to the facts in the case at bar. Since petitioner's claim for attorney's fees was part of his main claim in this case, only a timely Rule 59(e) motion could have vested the Court with jurisdiction, after judgment, to hear his present application for an award of attorney's fees (See Point I infra.). Nor can the petitioners properly argue that their claim for attorney's fees is a collateral claim independent of the cause of action already adjudicated. Their claim for attorney's fees is grounded entirely on 42 U.S.C. 1988, a codification of the Civil Rights Attorney's Fee Award Act of 1976. An

analysis of the 1976 Act demonstrates the fallacy of such argument.

Prior to the 1976 Act, the courts were clearly divested of any jurisdiction to award attorneys fees after final judgment. Thus, in *DeBuit* v. *Hartwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) it was held that the issue of attorneys' fees is a matter to be decided upon at the time of judgment and not to be left open pending appeal (See Appendix A attached). Five years earlier in *Stacy* v. *Williams* 446 F.2d 1366 (5th Cir. 1971), the Court held that costs in a judgment do not include attorneys' fees and the bill of costs could not be amended to include them (See Appendix A attached).

Following this, and in accord with this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society* 421 U.S. 240 (1975), the Civil Rights Attorney's Fee Award Act of 1976 was enacted. The legislative history of the 1976 Act clearly demonstrated that Congress did not intend to create any "startling new remedy" but merely to meet the technical requirements laid down in the earlier court decisions (See Appendix B, attached). Thus, the 1976 Act was not intended to create any independent collateral claim which was not then in existence.

Accordingly, any right the plaintiffs may have had to recover attorneys' fees was inseparable from their main claim and ceased to exist after judgment.

POINT III

Attorney Fee Awards Under 42 U.S.C. 1988 Are Not Costs Under Rule 54D.

In *White*, the First Circuit rejected the theory that attorney's fees are taxable costs under Rule 54(d). Although the 1976 Attorney's Fee Award Act permits the

Court, in its discretion, to allow attorneys' fees "as part of the costs," the Court should take judicial notice that attorney's fees differ substantially from costs ordinarily taxed by the *Clerk of the Court.* The costs usually allowable under Rule 54(d) (such as those having to do with printing, disbursements, etc.) are readily computable by the Clerk of the Court. In evaluating a request for attorney's fees, the Court must consider many issues such as the complexity and novelty of the legal question, customary fees in the area, and the skill and experience required to present the case. The taxing of ordinary costs does not usually forment controversy between the parties. However, an attorneys' fee award usually requires a contested hearing before the Court. Thus, attorneys' fees cannot be equated with taxable costs. See *Gary* v. *Spires,* 634 F.2d 772 (4th Cir. 1980).

Nor may petitioner argue that the time to apply for attorneys' fees has not expired because the time to file a bill of costs has not expired. "A bill of costs shall be filed in the case and, upon allowance included in the judgment or decree," 28 U.S.C 1920. To include costs in the "judgment or decree" means they must have been taxed prior to final judgment. Thus, where a *final* judgment has been entered, no bill of costs can be later filed.

CONCLUSION

Every action or proceeding must have a finite end. The jurisdiction of the Court is invoked to seek specific relief which is spelled out in the pleadings. The ultimate judgment either grants or denies the relief sought. Attorneys' fees are awardable by the Court to a prevailing party who makes a timely request in an appropriate case. If no request is made before judgment (or within ten days thereafter), the judgment has determined all of the issues in the case and becomes final and the case is finished. To permit a final judgment to be modified after expiration of the statutory time limitations, means the case is never really concluded. In the case at bar, there was a trial, a judgment, and no timely application to modify the judgment.

Accordingly, this Court should affirm the decision of the First Circuit Court of Appeals, and reject the decision of the Fifth Circuit in the case of *Knighton* v. *Watkins* 616 F.2d 795 (5th Cir. 1980), by holding that Rule 59(e) bars a motion for attorneys' fees made later than ten days after judgment is entered and an untimely motion to amend the final judgment must be denied.*

Respectfully submitted,

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*In order to be timely, the County of Rockland is compelled to file this brief prior to petitioners' brief being served upon us. We may therefore seek to file a supplemental brief after a review of petitioners' brief.

APPENDIX

APPENDIX A

ATTORNEYS FEES CLAIMS PRIOR TO ENACTMENT OF THE 1976 ACT

But for the 1976 Act, this Court clearly would lack jurisdiction over this claim. *DuBuit* v. *Hartwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976); *Stacy* v. *Williams*, 446 F.2d 1366 (5th Cir. 1971).

DuBuit, supra, arose out of a patent infringement suit; the 1976 Act was inapplicable. On October 26, 1972, the Court entered judgment that the plaintiffs' patent was valid, but not infringed. The judgment was silent on attorneys' fees.

On November 2, 1972, the defendants filed a timely motion for amendment of the judgment under Rule 59(e), and moved for attorneys' fees. Next day, the plaintiffs moved for amendment of the judgment order, but they did not seek attorney's fees. On November 30, 1972, the District Court denied the defendants' amendatory motion, but it did not rule on their motion for attorney's fees. The Court granted the plaintiffs' motion in certain limited respects. The case was complicated by the fact that, on December 15, 1972, one of the three plaintiffs appealed from the judgment with respect to issues that had been resolved against him. The Fourth Circuit affirmed the District Court's judgment on October 15, 1973. On March 22, 1974, defendants filed a document entitled "Supplemental Affidavit in Support of Renewed Motion for Attorney's Fees and Expenses," and the District Court awarded them attorney's fees on November 5, 1974.

The Fourth Circuit reversed the award, concluding that, for several reasons, the District Court had no jurisdiction to consider the motion. First, the District Court's denial of the defendants' Rule 59(e) motion on November 30, 1972, had effectively disposed of the defendants' motion for attorney's fees as well. Although the District Court had not expressly addressed the fee issue, the Court of Appeals refused to accept "defendants' contention that the jurisdiction of the Court could be preserved by correspondence or statements dehors the official record." *Id.* at 693.

Second, the Court of Appeals disagreed with the District Court's statement that it retained authority to award the fees because the issue had been deferred pending the outcome of the plaintiff's appeal: "The issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment in this case and not left open pending outcome of the appeal." *Id.* at 694.

Finally, when the Fourth Circuit affirmed the final judgment, "this put an end to the litigation and the District Court had no authority to reopen the case for the consideration of attorney's fees or any other purpose." *Id.* The defendants made their renewed efforts to obtain attorney's fees more than two years after the original judgment, and one year after that judgment had been affirmed — clearly outside the limit set by Rule 59(e).

Thus, in *Du Buit,* the Fourth Circuit considered denial of a Rule 59(e) amendatory motion equivalent to a denial of a motion for attorney's fees. The opinion also made it clear that the issue of attorney's fees should be resolved before final judgment, or by a proper motion to alter or amend the judgment.

Stacy v. *Williams,* 50 F.R.D. 52 (N.D. Miss. 1970), *aff'd,* 446 F.2d 1366 (5th Cir. 1971), stemmed from an earlier action in which the plaintiffs sought a declaratory judgment, pursuant to 28 U.S.C. § 2201, that certain uniform regulations restricting speakers on Mississippi college campuses were unconstitutionally vague, and violated the First Amendment. *Stacy* v. *Williams,* 306 F.Supp. 963 (1970). The District Court entered judgment for the plaintiffs on December 1, 1970, and the judgment decree directed that all "costs [of the suit] be taxed against the defendants." *Id.* at 964. On February 11, 1970, plaintiffs filed a motion to amend their bill of costs, submitted on December 9, 1970, and for allowance of attorney's fees. The District Court denied the motion because it had not been filed within the ten day limit of Rule 59(e). Citing *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714

(1967), the Court said that the reference to "costs" in the judgment decree did not include attorney's fees, and that the bill of costs could not be amended to include them. The Fifth Circuit affirmed the District Court's application of Rule 59(e) as "clearly correct," and quoted the following language from the District Court Opinion:

> That rule is particularly applicable to a motion to alter or amend a judgment to allow attorney's fees which were neither asked for before judgment nor mentioned in the judgment. We are not concerned here with correcting a mere clerical mistake in the terms of the judgment, but with granting new substantive relief, and the motion therefore must comply with Rule 59(E). (citation omitted)

Stacy v. *Williams*, 446 F.2d 1366 (5th Cir. 1971) at 1367.

APPENDIX B

THE 1976 ACT DOES NOT CREATE A NEW REMEDY

It may be argued that the 1976 Act somehow creates a new, independent claim for attorney's fees, standing apart from any remedies available in the main proceeding in this case. This position is contradicted by the legislative history behind the 1976 Act.

The 1976 Act began as S. 2278. Because the Senate version of the bill was passed in lieu of the House version, the Senate Report (Judiciary Committee) No. 94-1011 is particularly instructive. That report clearly indicates that the sole purpose of the act was to

> remedy anamalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws.

S. Rep. No. 94-1011, 94th Cong. 2d Sess. reprinted in (1976) U.S. Code Cong. & Ad. News 5908, 5909.

The Senate Report also discussed similar statutes that had long been in existence.

> In cases under these [similar] laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies.

Id. at 5910 (emphasis added).

> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an *integral part of the remedies necessary to obtain such compliance.* Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5.

Id. at 5913 (emphasis added).

> This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if Federal Courts are to continue the practice of awarding attorney's fees which had been going on for years prior to [Alyeska].

Id.

Clearly, the 1976 Act was not intended to create any independent, collateral claim.

(Appendix A and B have been taken from Defendants' memorandum in the case of *Hirschkop* v. *Snead*, filed in the Eastern District of Virginia)